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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE TESLA, INC. SECURITIES
LITIGATION

Case No. 3:18-cv-04865-EMC

**PLAINTIFF'S MOTION FOR
JUDGMENT AS MATTER OF LAW**

ORAL ARGUMENT REQUESTED

Date: TBD

Time: TBD

Location: Courtroom 5, 17th Floor

Judge: Hon. Edward Chen

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that, as soon as possible, on a date to be decided by the Court, in Courtroom 5 – 17th Floor of the United States Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, CA 94102, the Honorable Edward M. Chen presiding, Plaintiff, through his counsel, will move, and hereby does move pursuant to Federal Rule of Civil Procedure 50(a) for judgment as a matter of law on this issues of: (1) the Rule 10b-5 Claim element of “materiality”; and (2) classwide and individual reliance under *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). Defendants have been fully heard on these issues and the evidence falls categorically in support of Plaintiff. Defendants have failed to proffer evidence to support their claim that the tweets were not material and have not rebutted the “fraud-on-the-market” presumption.

PLEASE TAKE FURTHER NOTICE that this motion is based on the Memorandum of Points and Authorities below, the record of evidence from trial, the arguments of counsel, and any other matters properly before this Court. Pursuant to Paragraph 11 of the Court’s Civil Standing Order, Plaintiff also submits a proposed order.

ISSUES TO BE DECIDED

1. Should the Court grant judgment as a matter of law in favor of Plaintiff on the issue of materiality because the totality of the evidence admitted during trial shows indisputably that the tweets (1) “Am considering taking Tesla private at \$420. Funding secured.” and (2) “Investor support confirmed. Only reason why this is not certain is that it’s contingent on a shareholder vote.” were material?

2. Should the Court grant judgment as a matter of law in favor of Plaintiff on the issue of classwide reliance because Defendants failed to introduce evidence capable of rebutting the “fraud-on-the-market” presumption?

3. Should the Court grant judgment as a matter of law in favor of Plaintiff on the issue of direct reliance because the testimony shows Lead Plaintiff Glen Littleton and Tim Fries

1 directly relied on the “funding secured” tweet when deciding to invest in Tesla stock and/or
2 options?

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2 229 F. Supp. 3d 739 (N.D. Ill. 2017)..... 12

3 **Rules**

4 FED. R. CIV. P. 50(a) 10

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff moved for partial summary judgment on the elements of falsity, scienter, and reliance. The Court granted the motion in part. The “funding secured” tweet, Exhibit 8, and the “investor support confirmed” tweet, Exhibit 13, were false and made with scienter but questions of fact existed as to whether they were “material” and, in turn, provided Defendants with an opportunity at trial to rebut the “fraud-on-the-market” presumption of reliance. Defendants have now been fully heard on these issues. The evidence admitted at trial does *not* support their arguments. The jury does not have a legally sufficient evidentiary basis to find that the tweets were *not* material or that Plaintiff is *not* entitled to classwide reliance under the “fraud-on-the-market” presumption.

Plaintiff has provided the jury with extensive evidence that the false “funding secured” tweet in Exhibit 8 and the “investor support confirmed” tweet in Exhibit 13 were material to investors. Elon Musk openly admitted that he intended his August 7 tweets to be read and relied upon by his followers on Twitter. Immediately following the tweets, analysts and investors barraged Tesla’s investor relations head, Martin Viecha, with emails seeking clarification on the words “funding secured.” Analysts and news commentators similarly focused their reporting on “funding secured,” what those words meant, and how they impacted the stock. Testimony from other witnesses further confirmed the materiality of the “funding secured” tweet in Exhibit 8, with Michael Hartzmark, Ph.D., in particular, offering an extensive and unrebutted quantitative and qualitative analyses proving without exception that the “funding secured” tweet in Exhibit 8 and the “investor support confirmed” tweet in Exhibit 13 were material. By comparison, Defendants offered nothing. They proffered no evidence showing that the tweets were not material. The only evidence before the jury demonstrates that unequivocally that the tweets in Exhibit 8 and Exhibit 13 were material to investors.

Where, as here, a party has no evidence in support of their argument, judgment as a matter of law is appropriate under Federal Rule of Civil Procedure 50. There is no need to task the jury

1 with deliberations on the issues of materiality and reliance. They can be decided now in favor of
2 Plaintiff.

3 **II. RELEVANT FACTS**

4 **A. Elon Musk's Testimony**

5 Musk also testified to the materiality of the “funding secured” tweets (both Exhibits 8 and
6 13). During the first day of his testimony, Musk admitted he intended his tweets about Tesla to
7 reach his “millions of followers,” that his tweets affected the price of Tesla’s stock, and that
8 information about Tesla in his tweets are “information that [Musk] think[s] the public should
9 hear.” 1/20 Tr. at 681:23-685:5. Then, during the following day of his testimony, Musk admitted
10 that “funding secured” was one of the three central pieces of information he sought to disclose to
11 the market on August 7, 2018 and intentionally did so for the purpose of “communicat[ing] this
12 to all investors of Tesla” and “wanted them to rely on this tweet . . . in making their decisions
13 about buying or selling Tesla securities.” 1/23 Tr. at 787:9-788:4. Musk even admitted that he
14 expected “that likely there would be some increase” in the price of Tesla’s stock in response to
15 his tweet. *Id.* at 789:22-25. Moreover, Musk acknowledged that news of his funding to take Tesla
16 private was “material non-public information.” *Id.* at 746:16-22. He also acknowledged that this
17 information should not have been disclosed during market hours because “you would not disclose
18 important information during a trading day.” *Id.* at 786:7-13. Indeed, the disruption caused by the
19 “funding secured” tweets led to Nasdaq halting trading in Tesla shares on August 7. *Id.* at 804:7-
20 10. Musk only exacerbated this disruption with his second tweet—“Investor support is confirmed
21”—given that he made it without having spoken to any investors other than the Saudi PIF.
22 1/23 Tr. at 863:19-23. This, too, was intended to be read by investors, as explained by Musk
23 during his testimony. 1/24 Tr. at 938:6-14.

24 Further proof of materiality comes from the emails Musk received in the hours following
25 the “funding secured” tweets. Musk posted an employee email (blog post) to Tesla’s blog on
26 August 7 (which was provided to the public vis-à-vis the “Investor support is confirmed” tweet
27 (Exhibit 13). The post did not contain anything further or “specific about funding.” *Id.* at 804:18-
28 19. Following the blog post, Tesla’s CFO, Deepak Ahuja, emailed Musk alerting him that “We

are getting a lot of enquiries from investors, SEC and the media to better understand the comment ‘Funding secured.’” *Id.* at 811:16-812:11 (referring to Exhibit 337). This is proof positive that “funding secured” was the driving piece of information behind the market’s reaction to the tweets.

B. Martin Viecha’s Testimony

Martin Viecha, Tesla’s Senior Director of Investor Relations, provided compelling evidence bearing directly on the materiality of the “funding secured” tweets. He began his testimony by confirming he “immediately” began receiving inquiries in response to the tweets. 1/24 Tr. at 1052:23-1053:4. These inquiries came from several well-known analysts that closely followed Tesla. Itay Michaeli from Citi asked, “The employee letter didn’t make clear whether there is an actual transaction on the table (with secured financing) or if this is more of a strategic announcement to consider pursuing such transaction.” *Id.* at 1054:10-17 (quoting Exhibit 146). Mr. Michaeli’s question tracks precisely with the parties’ competing views on the tweet and, tellingly, Mr. Viecha’s response squarely supports Plaintiff’s argument and the relief he seeks by way of this motion. In response to Mr. Michaeli’s question, Mr. Viecha writes: “The very first tweet mentioned a firm offer.” *Id.* at 1055:7-11.

Mr. Viecha reiterated his response in subsequent emails to other analysts and investors, including:

- Bradley Erickson from KeyBank. Mr. Erickson wrote: “He said financing is secured but in the letter he doesn’t address this. Can you clarify?” Mr. Viecha responded: “I can only say that the first tweet clearly stated that ‘financing is secured.’ Yes, there is a firm offer.” *Id.* at 1058:8-1059:18 (referring to Exhibit 150);
- Owuraka Koney from Jennison Associates. Mr. Koney wrote: “Nothing on funding, though?” Mr. Viecha responded: “The very first tweet simply mentioned ‘Funding secured’ which means that that is a firm offer. . . . I would assume that given we went full-on public with this, the offer is as firm as it gets.” *Id.* at 1060:14-1062:24 (referring to Exhibit 58); and
- Toni Sacconaghi from Bernstein Alliance. Mr. Sacconaghi asked: “What does

1 ‘Financing secured’ actually mean? Are you assuming Tesla will need 60 billion
 2 plus in financing, or assuming that many shareholders don’t take the offer and
 3 Tesla needs less? Big difference. ‘Financing secured’ implies the former.” Mr.
 4 Viecha responded unequivocally, “It means that financing is secured regardless of
 5 other assumptions.” *Id.* at 1064:17-1066:14 (referring to Exhibit 151).

6 Mr. Viecha confirmed on cross-examination with his counsel there were “many that asked
 7 the same thing” as the above analysts. *Id.* at 1098:11-23 (Q Was he the only analyst who asked
 8 you what that phrase meant? A No. There were many that asked the same thing [referring to
 9 Exhibit 151].”).¹ Moreover, Mr. Viecha testified that he did not view the “funding secured” tweet
 10 separately but instead as one succinct message. *Id.* at 1056:19-1057:6 (Q Did you interpret
 11 “Funding secured” as being part of the firm offer? A I really didn’t think about it as a – as a
 12 separate statement”). Mr. Viecha also received numerous questions about the “Investor
 13 support is confirmed” tweet, similarly demonstrating its importance to the market. 1/25 Tr. at
 14 1278:9-11.

15 **C. Testimony from JP Morgan’s Ryan Brinkman, T. Rowe Price’s Joe Fath, and**
 16 **Jennison Associate’s Owuraka Koney.**

17 Messrs. Brinkman, Fath, and Koney testified at length about the materiality of the
 18 “funding secured” tweets. Given their role in the market as analysts who closely followed Tesla,
 19 their opinions and observations are highly credible and of significant import. In response to
 20 “Funding secured,” Ryan Brinkman, an analyst covering Tesla from JP Morgan, increased his
 21 price target “very materially” from \$195 to \$308. Brinkman Tr. 72:24-73:15. In the note,
 22 Brinkman provided reasons for increasing his price target and stated “Either funding is secured
 23 or it is not secured. Tesla CEO says funding is secured.” Ex. 61.

24 Joseph Fath, a Vice President at T. Rowe Price, who served as a proxy for the market,
 25 confirmed that he believed “Funding secured” was material. Fath Dep. Tr. 45:23-46:8 (“Q. What
 26 was your understanding of the meaning of the words ‘investor support is confirmed’? A. Well,

27 _____
 28 ¹ See also Exhibits 145, 146, 147, 150, 151, 155 (emails from investors and discussion of media
 feedback focusing on “funding secured”).

1 with the funding secured Tweet followed by this, that he had it lined up, whatever investors that
 2 may be, to support the transaction and be able to take them private. That was my, you know - -
 3 and again, I think it just reinforced the funding secured.”).

4 Defendants’ own witness, Owuraka Koney of Jennison Associates, an investor in Tesla,
 5 confirmed that it was important to him that the CEO of Tesla had said that funding was secured
 6 publicly. Koney Dep. Tr. 71:20-71:22 (“Q. Was it important to you that the CEO of Tesla had
 7 said that funding was secured publicly? A. Yes.”).

8 **D. Testimony from Michael Hartzmark, Ph.D.**

9 Dr. Hartzmark testified on behalf of Plaintiff about the materiality of the “funding
 10 secured” tweets. He testified that following the tweets he observed an “immediate[] . . . spike in
 11 volume” and “spike in the price.” 1/31 Tr. at 1651:10-12. He also observed an “immediate[] spike
 12 up” once trading resumed after the Nasdaq halt. *Id.* at 1651:21-25. The tweets also caused a
 13 decline and rise in the price of Tesla’s options. *Id.* at 1653:3-12. Dr. Hartzmark concluded that
 14 the “funding secured” tweets were “economically material” because they “change[d] the mix and
 15 alter[ed] buying and selling decisions” within the market. *Id.* at 1656:21-1657:1. He confirmed
 16 that, “My opinion is that the tweets caused a material impact on the prices of the Tesla stock.” *Id.*
 17 at 1657:2-7.

18 Dr. Hartzmark elaborated upon his opinion. He explained that Nasdaq also considered the
 19 tweets to be material, given the fact that they halted trading on August 7. *Id.* 1657:19-1658:6
 20 (“The trading halt in Nasdaq was basically because it was at least Nasdaq’s opinion that there was
 21 material information that was going to be disclosed and so that, that in and of itself, would support
 22 . . . the information is material.”). Dr. Hartzmark also engaged in a quantitative analysis to
 23 evaluate the materiality of the tweets. He testified that he performed a statistical study referred to
 24 as a “regression” and confirmed with 95% certainty that Tesla’s stock price moved in response to
 25 the tweets (and not from unrelated market factors). *Id.* at 1658:7-16. The materiality of the tweets
 26 also impacted stock options and convertible notes. *Id.* at 1661:16-20.

27 Qualitatively, the evidence also established without a doubt that the “funding secured”
 28 tweets were material. Dr. Hartzmark relied on news reports, including CNBC (Exhibit 521), as

1 well as internal emails (Exhibit 337) and analyst reports and emails (Exhibits 15, 151). 1/31 Tr.
 2 at 1662:4-1666:7. These materials each focused with laser precision on the import of “funding
 3 secured” and demonstrated how the market responded to those two words. CNBC highlighted the
 4 announcement while other analysts attempted to elicit further information from Tesla as to what
 5 Musk meant (*i.e.*, whether an offer had been received or a written commitment had been given).
 6 As JP Morgan said, “As surprising to us as these developments are, and as lacking as the
 7 statements are in any details regarding who is expected to provide the required amount of
 8 financing and on what terms, they are nevertheless declarative statements from the CEO of a
 9 public company which we feel should be considered seriously. Either funding is secured or it is
 10 not secured, and Tesla’s CEO says funding is secured.” Exhibit 15-1. As explained by Dr.
 11 Hartzmark, JP Morgan’s report was especially meaningful because it adjusted the bank’s “price
 12 target” for Tesla, which required approval at senior levels. 1/31 Tr. at 1668:13-1670:11.

13 Dr. Hartzmark also confirmed that “Investor support is confirmed is confirmed . . .” was
 14 likewise material to investors. When asked, Dr. Hartzmark testified that “I’ve gone through and
 15 looked at these dates, looked at the movements in implied volatility and prices, it would suggest
 16 that, you know, that ‘investor support confirmed’ and ‘funding secured’ are very important pieces
 17 of information. And, again, the reason is that we see that the investors were interested in it. That’s
 18 the quintessential definition for economic materiality.” 1/31 Tr. at 1696:1-9.

19 Dr. Hartzmark clearly confirmed that “Based on all the information I’ve shown you from
 20 analysts, internal documents, price factors, volume factors, implied volatility, the convertible
 21 bonds all suggest that the tweets are material” and that “substantial qualitative evidence which
 22 would suggest that the ‘funding secured’ is material to the market.” *Id.* at 1673:17-1674:8. Dr.
 23 Hartzmark also confirmed that this conclusion applied to the second tweet (“Investor support is
 24 confirmed . . .”), stating that the “qualitative information . . . suggests that its information . . . is
 25 important to the mix of information investors act[ed] on.” *Id.* at 1674:9-14. Dr. Hartzmark
 26 explicitly identified a substantial spike in response to the “Investor support is confirmed . . .”
 27 tweet once trading resumed on Nasdaq after the halt. *Id.* at 1651:22-25 (“Immediately at 3:45
 28 when trading resumes, again, as you would expect in an efficient market, the price immediately

1 spikes up. Tremendous amount of volume ending the day a little bit lower than its peak. It ends
2 the day at \$379.57.”).

3 **E. Additional Witness Testimony and Trial Exhibits**

4 All other witnesses to testify agreed (or, at least, did not dispute) that the “funding
5 secured” tweets were highly material. Lead Plaintiff Glen Littleton testified that “funding
6 secured” was the “primary driver,” the “only thing that mattered,” and the “most important” part
7 of the August 7, 2018 tweet. 1/18 Tr. at 362:9-13 (“Q Okay. Did this change your approach to
8 your portfolio in any way towards Tesla? A No, because ‘Funding secured’ was so definite to me,
9 that that was the primary driver. This helped confirm that, but, no, it didn't change anything.”);
10 388:16-18 (“A Um, no, ‘Funding secured’ is -- was the only thing that mattered to me. Because
11 that was such a defining statement.”); 426:1-5 (“But the fact that ‘Funding secured’ was stated on
12 the 7th was my driving argument. My -- the only thing I could really focus on, because that was
13 all that mattered to me. So I got out of things to -- to save my livelihood.”); 462:4-6 (“Q And what
14 to you, again, was the most important aspect of deciding that it was a done deal? A What was the
15 most important of – ‘Funding secured’?”).

16 Tim Fries testified on January 20, 2023. Similar to Mr. Littleton, he relied on the “funding
17 secured” tweet when deciding to invest in Tesla. Mr. Fries testified that he had been looking for
18 a “good entry point” into Tesla for some time when, on August 7, 2018, he saw the tweet on
19 CNBC and decided to invest. 1/20 Tr. at 507:20-509:18 (Q What led you to buy the stock in Tesla
20 on August 8, 2018? A It was the tweet. . . . Q Was the representation ‘funding secured’ in that
21 tweet important to you at that time? A Yes. The phrase ‘funding secured’ in that tweet was critical.
22 Funding secured gave me the confidence that I could get in and – at that 420 price. . . .”).

23 Professor Guhan Subramanian echoed Messrs. Littleton and Fries on this point, despite
24 not offering a formal opinion on this issue of materiality. In pertinent part, Professor Subramanian
25 discussed the “highly unusual” nature of Musk’s “funding secured” tweets considering that they
26 related to a “major public company MBO” and were made in the middle of the “trading day.”
27 1/20 Tr. at 584:10-585:7. Further, Professor Subramanian testified at length about the typical
28 process in involved in MBOs and how Musk’s “Investor support is confirmed . . .” tweet was

1 unrealistic and illusory in light of ordinary and reasonable practices. 1/20 Tr. at 635:15-639:16
 2 (“He’s basically saying only reason why this is not certain is that it's going to the shareholder vote
 3 and they might vote it down. That's just not true. It's wrong.”).

4 Deepak Ahuja, Tesla’s former CFO, confirmed that the August 7 tweets were undeniably
 5 material, and that Nasdaq halted trading as a direct result of the material tweets. 1/25 Tr. 1157:21
 6 (“The going-private comment does - - is material information.”); *id.* at 1158:2-3 (“[Nasdaq did
 7 respond to the tweet in that sense. All, all the other tweets that were there, yeah.”); *id.* at 1159:3-
 8 4 (“It was material information, and Nasdaq stopped the trading, is all I can comment.”); *id.* at
 9 1165:14-16 (“Q [Investors, SEC and the media] wanted information on ‘Funding secured,’
 10 correct? A That’s correct. ‘Funding secured’ was not a term of art. It was - - it was - - hence,
 11 people wanted to understand that term.”).

12 Antonio Gracias, Tesla’s lead independent director, confirmed that “[T]here were lots of
 13 questions about what [Funding secured] meant.” 1/25 Tr. 1240:8-11 (“Q. But the board aware
 14 that Tesla, the company, had been receiving questions and inquiries regarding ‘Funding secured.’
 15 Correct? A. Yes. There were lots of questions about that that meant.”); *id.* at 1240:17-20 (“Q And
 16 you personally got lots of questions regarding this tweet. Correct? A I mean people asked me
 17 questions about it, for sure. Yeah.”).

18 Robyn Denholm, the Chair of the Audit Committee of the Board, testified that while she
 19 did not recall “just ‘Funding secured’ being part of the inquiries. There were a lot of inquiries. I
 20 mean there was a lot of press articles.” 1/27 Tr. at 1478:13-18. And ultimately, she testified that
 21 Exhibit 8 and the news around it were material. 1/27 Tr. at 1478:24-1479:1 (“Of course it was
 22 material.”). When Defendants questioned Ms. Denholm regarding the significance of “Funding
 23 secured,” she stated that the first part of the tweet was the “most important” part but did not
 24 dispute that the tweet overall was nonetheless material. 1/27 Tr. at 1491:24-1492:4 (“Q. How did
 25 you view the significant of the second part of the tweet, “Funding secured”? A. Quite honestly, I
 26 think the first part of the tweet was the most important thing for anyone, for investors and for the
 27 general public, because clearly taking Tesla private was a big deal.”).

28 Mr. Durban also confirmed that the difference between “Funding secured” and the actual

1 state of affairs was significant enough to influence a reasonable investor’s decision whether to
 2 buy or sell securities in that company. For example, Mr. Durban affirms that “it is typical for
 3 some form of definitive agreement to be in place before a public announcement of a going-private
 4 transaction is made” (1/27 Tr. at 1342:9-12), and that “typically, financing is arranged before a
 5 definitive agreement is signed for a going-private.” (*id.* at 1342:13-15). Mr. Durban
 6 acknowledged that there was not “any definitive agreement in place” (*id.* at 1343:3-5) at the time
 7 of the August 7, 2018 tweets, and that in his experience it takes “three to six months” to get a
 8 definitive agreement in place (*id.* at 1343:14-17). This stands in stark contrast to the term “funding
 9 secured.” Mr. Durban affirmed that as of August 23, 2018, there still was not “any committed
 10 financing for any going-private transaction.” *Id.* at 1372:4-6. He also affirmed that “the full price”
 11 and “the amount of capital” needed for taking Tesla private had still not yet been decided as of
 12 August, 23, 2018. *Id.* at 1372:18-1373:1. In fact, Mr. Durban confirmed that the neither the
 13 “structure,” “total amount of capital,” “price,” nor “the percentage of shareholders who would
 14 roll into a private Tesla” were ever finalized. *Id.* at 1373:2-16. Indeed, due to these factors, a
 15 “formal proposal” was never sent to the board, there was never a “final conclusion about whether”
 16 using an SPV was even viable, and as of August 23, 2018, “there was still substantial uncertainties
 17 as to whether a going-private transaction could proceed.” *Id.* at 1373:17-19; 1393:9-13; 1393:17-
 18 22; *see also* Exhibits 179 and 201 (presentations showing that go-private process was in earliest
 19 stages and still waiting for financing).

20 Mr. Durban also differentiated between an interest in doing a transaction and a
 21 commitment to finance one. *Id.* at 1394:12-18 (“Q. Is an indication of interest expressed that way
 22 the same as a commitment to financing? A. No. Q. Okay. What’s the difference? A. Um, an
 23 interest is an expression of interest. A commitment is a signed legal document committing you to
 24 wire money.”). Mr. Durban then testified that after the August 7 tweet, he spent the next two
 25 weeks trying to raise funding. *Id.* at 1343:22-24. When he had his first in-person meeting with
 26 Elon Musk on August 10, 2018, he testified that the potential going-private transaction for Tesla
 27 was not even yet at “Stage 1.” *Id.* at 1349:23-1350:3. Given the stark contrast between “Funding
 28 secured” and the true state of affairs, Mr. Durban’s testimony provides further support that the

1 difference between the disclosure and the actual state of affairs is significant enough to influence
 2 a reasonable investor's decision whether to buy or sell securities in that company.

3 Mr. Dees, the other financial banker hired by Mr. Musk, confirms the stark contrast of the
 4 state of affairs to Mr. Musk's "funding secured" statement. Mr. Dees affirms that he had not
 5 spoken to Mr. Musk prior to Mr. Musk's August 7, 2018 tweet. 1/27 Tr. at 1400:13-18 (testifying
 6 that he was "surprised he was considering taking it private, surprised that we weren't involved at
 7 Goldman."); *id.* at 1431:5-22. He confirms that it was never "determined how many shareholders
 8 would actually roll into a potential going-private transaction." *Id.* at 1410:16-19. As of August
 9 15, 2018, Mr. Dees confirms that they "were looking to obtain documentation confirming
 10 financing from those investors" (*id.* at 1423:10-13) and they had not "collected any signed
 11 commitment documents from any potential investor in a going-private transaction for Tesla." *Id.*
 12 at 1425:11-14. In fact, Mr. Dees indicated that as of August 16, 2018, Goldman Sachs, along with
 13 Silver Lake, were still "trying to develop a fully financed proposal." *Id.* at 1428:12-22. Despite
 14 Defendants repeated assertions that funding secured means funding available, Mr. Dees confirms
 15 that there is a difference between "funding being available and funding being committed." *Id.* at
 16 1463:13-20.

17 **III. LEGAL STANDARD**

18 Rule 50(a) provides that a court may grant "judgment as a matter of law" against a party
 19 "[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient
 20 evidentiary basis for a reasonable jury to find for that party on that issue." FED. R. CIV. P. 50(a).
 21 "Judgment as a matter of law is proper when the evidence permits only one reasonable
 22 conclusion[.]" *Ostad v. Oregon Health Scis. Univ.*, 327 F.3d 876, 881 (9th Cir. 2003). "[I]n
 23 entertaining a motion for judgment as a matter of law, the court . . . may not make credibility
 24 determinations or weigh the evidence." *EEOC v. Go Daddy Software, Inc.*, 581 F.3d 951, 961
 25 (9th Cir. 2009) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.
 26 Ct. 2097, 147 L. Ed. 2d 105 (2000)).

27 **IV. ARGUMENT**

28 A statement is "material" when there is a "substantial likelihood that a reasonable

shareholder would consider it important.” *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (“Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.”). This is an objective test, assessing the significance of a piece of information to a “reasonable investor.” *Id.* at 445; *accord Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 467 (2013) (noting materiality is an objective test); *S.E.C. v. Reyes*, 491 F. Supp. 2d 906, 910 (N.D. Cal. 2007) (“The law assesses the materiality of a misrepresentation at the time it is made, not after intervening events or remedial action have rendered it harmless.”). Materiality is assessed “at the time of the [statement].” *Miller v. Thane Int’l, Inc.*, 519 F.3d 879, 892 (9th Cir. 2008). Given the evidentiary record here, there can be no question that Musk’s August 7 tweets were “material” to investors.

A. Musk Admitted that the “Funding Secured” Tweet Was Material Market-Moving News.

There is no dispute that Musk intended for his “funding secured” tweet to be read as one cohesive message, *i.e.*, both sentences read together. As he explained during his testimony, Musk tweeted “Am considering taking Tesla private at \$420. Funding secured.” because he was “considering -- very importantly, considering -- not that it will happen, but that I’m thinking about it -- taking Tesla private at 420. And that, in my opinion, the funding is secured for taking Tesla private at that price.” 1/23 Tr. at 787:9:16. Moreover, Musk testified that he wanted to communicate these three points (*i.e.*, that he was considering taking Tesla private at a particular price with funding secured) to investors of Tesla and that he wanted investors to rely on the tweet. *Id.* at 787:23-788:4 (Q Okay. Now, and you wanted to communicate this to all investors of Tesla, correct? A Yes. Q And you wanted them to rely on this tweet, right, in making their decisions about buying or selling Tesla securities, correct? A Yes.). Mr. Viecha’s testimony supported this point considering that he, too, did not view the “funding secured” tweet separately but instead as one succinct message. *Id.* at 1056:19-1057:6 (Q Did you interpret “Funding secured” as being part of the firm offer? A I really didn’t think about it as a – as a separate statement”).

1 Musk’s admission in this regard proves that he wanted and, in fact, believed his tweet to
 2 be “material” market-moving information. Thus, given that Musk intended others to rely on the
 3 tweet, there can be no dispute that it was “material” at the time it was made. *See Fed. Hous. Fin.*
 4 *Agency v. Deutsche Bank AG*, 903 F. Supp. 2d 285, 289 (S.D.N.Y. 2012) (noting that term sheet
 5 cautionary “statements are not disclaimers of reliability; to the contrary, the use of these materials
 6 to market and sell the Certificates suggests that defendants fully intended the [purchasers] to rely
 7 on the representations they contained”).

8 **B. Analysts and Investors Testified that the “Funding Secured” Tweet Was**
 9 **Important and Material Information.**

10 Extensive testimony was heard concerning the market’s reaction to the “funding secured”
 11 tweet and the widespread belief that it was important and highly material. Analysts and investors
 12 immediately sought further information from Tesla after Musk sent the tweet, including from Itay
 13 Michaeli from Citi (1/24 Tr. at 1054:10-17), Bradley Erickson from KeyBank (*id.* at 1058:8-
 14 1059:18), Owuraka Koney from Jennison Associations (*id.* at 1060:14-1062:24), and Toni
 15 Sacconaghi from Bernstein Alliance (*id.* at 1064:16-1066:14). Glen Littleton and Tim Fries, the
 16 plaintiff-investors who testified during trial, equally said that they thought “funding secured” was
 17 the most material part of the tweet. Mr. Littleton said unequivocally that “funding secured” was
 18 the “primary driver,” the “only thing that mattered,” and the “most important” part of the August
 19 7, 2018 tweet. 1/18 Tr. at 362:9-13. Mr. Fries likewise said that he had been looking for a “good
 20 entry point” into Tesla for some time when, on August 7, 2018, he saw the tweet on CNBC and
 21 decided to invest. 1/20 Tr. at 507:20-509:18. These analysts and investors either asked about or
 22 relied upon the statement “funding secured,” thereby showing that the tweet overall and that
 23 portion of it in particular were highly material.

24 Analysts serve as a proxy for the market and where, as here, they focus on a particular
 25 fact, that is strong evidence that the fact is material. *See Patel v. Parnes*, 253 F.R.D. 531, 546-50
 26 (C.D. Cal. 2008) (incorporating analyst reports to show when the alleged misrepresentations were
 27 provided to the market and their materiality); *see also United States SEC v. Ustian*, 229 F. Supp.
 28 3d 739, 761-62 (N.D. Ill. 2017) (“Courts routinely consider analyst reports during motions to

dismiss securities fraud claims to resolve questions about the materiality of alleged misrepresentations and omissions.”); *In re Regeneron Pharm., Inc. Sec. Litig.*, 2005 U.S. Dist. LEXIS 1350, at *62-63 (S.D.N.Y. Feb. 1, 2005) (materiality evidenced by analyst reports). Analysts were laser focused on the “funding secured” tweet. Accordingly, this evidence shows that it was highly material to the market.

C. “Funding Secured” Materially Misstated the True State of Affairs that Existed at the Time of the Tweet.

Musk’s false statement also differed materially from the true state of affairs that existed. While Musk said that funding for the go-private transaction was “secured,” it was not. Musk had not obtained any commitment in writing, which was the defining feature of “secured” funding according to his bankers. This is evidenced by the Saudi PIF’s meeting minutes from the July 31, 2018 meeting as well as Yasir Al-Rumayyan’s text messages to/from Musk in the days that followed. *See* Exhibits 80, 121. These documents make clear that no agreement was reached but instead their meeting left off with an agreement by Musk to provide the Saudi PIF with additional information concerning how, when, and for what price Musk wanted to take Tesla private.

Further to this, both Egon Durban from Silver Lake and Dan Dees from Goldman Sachs both testified that a mere indication of interest or availability of funds does *not* equal a written commitment for secured funding. In pertinent part, Mr. Durban testified that “some form of definitive agreement” is typically in place before the “a public announcement of a going-private transaction is made” (1/27 Tr. at 1342:9-12), and that “typically, financing is arranged before a definitive agreement is signed for a going-private.” (*id.* at 1342:13-15). In fact, as Mr. Durban explained, as of August 23, 2018, there still was not “any committed financing for any going-private transaction.” *Id.* at 1372:4-6. Importantly, Mr. Durban confirmed that “an interest is an expression of interest. A commitment is a signed legal document committing you to wire money.” *Id.* at 1394:12-18. This stands in stark contrast to the term “funding secured.”

Similarly, Mr. Dees testified that it was never “determined how many shareholders would actually roll into a potential going-private transaction” (*id.* at 1410:16-19) and that, as of August 15, 2018, Mr. Dees was still “looking to obtain documentation confirming financing from those

investors” (*id.* at 1423:10-13) and they had not “collected any signed commitment documents from any potential investor in a going-private transaction for Tesla” (*id.* at 1425:11-14). In fact, Mr. Dees indicated that as of August 16, 2018, Goldman Sachs, along with Silver Lake, were still “trying to develop a fully financed proposal.” *Id.* at 1428:12-22. Mr. Dees thus confirms that there is a difference between “funding being available and funding being committed.” *Id.* at 1463:13-20.

Mr. Viecha also demonstrates the material difference between what Musk said and the true state of affairs that existed at the time. Mr. Sacconaghi from Bernstein Alliance asked Mr. Viecha: “What does ‘Financing secured’ actually mean? Are you assuming Tesla will need 60 billion plus in financing, or assuming that many shareholders don’t take the offer and Tesla needs less? Big difference. ‘Financing secured’ implies the former.” Mr. Viecha responded unequivocally, “It means that financing is secured regardless of other assumptions.” *Id.* at 1064:17-1066:14 (referring to Exhibit 151). As we know, Mr. Viecha’s response was untrue; financing was not secured regardless of other assumptions. To the contrary, there were many assumptions in play relating to the financing, including the source, amount, and terms of the investment.

“[A] statement is misleading if it would give a reasonable investor the ‘impression of a state of affairs that differs in a material way from the one that actually exists.’” *Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 985 (9th Cir. 2008). Comparing Mr. Sacconaghi’s inquiry with Viecha’s response demonstrates the difference between what was represented (“Funding secured”) and what actually existed at the time (the Saudi PIF’s possible interest in investing). By industry standards, common knowledge, and practical usage, Musk’s tweet was “materially” false because funding was not committed.

D. There Is No Dispute that the “Funding Secured” Tweet Was Material.

Arguably the strongest evidence of materiality comes from Plaintiff’s expert, Michael Hartzmark, Ph.D. He testified that both quantitative and qualitative evidence proves the “funding secured” tweets were material. Dr. Hartzmark observed an “immediate[] . . . spike in volume” and “spike in the price” on August 7, 2018. Rough Tr. at 8. The tweets also caused a decline and

1 rise in the price of Tesla’s options. Rough Tr. at 10. Nasdaq also considered the tweets to be
 2 material, given the fact that they halted trading on August 7. Rough Tr. at 14. Dr. Hartzmark also
 3 testified that he performed a statistical study referred to as a “regression” and confirmed with 95%
 4 certainty that Tesla’s stock price moved in response to the tweets (and not from unrelated market
 5 factors). Rough Tr. at 16. The materiality of the tweets also impacted stock options and
 6 convertible notes. Rough Tr. at 18.

7 Qualitatively, Dr. Hartzmark confirmed without a doubt that the “funding secured” tweets
 8 were material. Dr. Hartzmark relied on news reports, including CNBC (Exhibit 521), as well as
 9 internal emails (Exhibit 337) and analyst reports and emails (Exhibits 15, 151). Rough Tr. at 19-
 10 21. These materials focused on what Musk meant when he tweeted “funding secured” (*i.e.*,
 11 whether an offer had been received or a written commitment had been given). Referring to the JP
 12 Morgan report, in particular, Dr. Hartzmark explained that it was especially meaningful because
 13 JP Morgan adjusted the bank’s “price target” for Tesla, which required approval at senior levels.
 14 Rough Tr. at 26.

15 Dr. Hartzmark clearly confirmed that “Based on all the information I’ve shown you from
 16 analysts, internal documents, price factors, volume factors, implied volatility, the convertible
 17 bonds all suggest that the tweets are material” and that “substantial qualitative evidence which
 18 would suggest that the ‘funding secured’ is material to the market.” Rough Tr. at 30. Dr.
 19 Hartzmark also confirmed that this conclusion applied to the second tweet (“Investor support is
 20 confirmed . . .”), stating that the “qualitative information . . . suggests that it’s information . . .
 21 is important to the mix of information investors act[ed] on.” Rough Tr. at 30.

22 This opinion has gone un rebutted. Thus, the jury has no evidence upon which it can
 23 reasonably conclude the “funding secured” tweets were *not* material. Without any sufficient
 24 adverse evidence on the issue, Plaintiff is entitled to judgment on the issue of materiality.

25 **E. Defendants Cannot Rebut the “Fraud-on-the-Market” Presumption for**
 26 **Classwide Reliance.**

27 Where, as here, a plaintiff alleges fraud-on-the-market, reliance is established where: “(1)
 28 the alleged misrepresentations were publicly known, (2) they were material, (3) the stock traded

1 in an efficient market, and (4) the plaintiff traded the stock between when the misrepresentations
 2 were made and when the truth was revealed.” *Halliburton Co. v. Erica P. John Fund, Inc.*, __
 3 U.S. __, 134 S. Ct. 2398, 2413 (2014) (“Halliburton II”). As set forth below, there is no dispute
 4 that the false statements in this case were publicly known, that Tesla’s stock traded in an efficient
 5 market, and that Plaintiff and members of the Class purchased Tesla stock and options between
 6 August 7, 2018, when Musk tweeted the false statements, and August 16, 2018. Defendants have
 7 provided no evidence, nor can they, demonstrating that the tweets in Exhibit 8 and Exhibit 13,
 8 found as false by the Court, were immaterial.

9 The evidence set forth in Plaintiff’s case demonstrates that reliance is clearly established.
 10 First, the tweets here in Exhibit 8 and Exhibit 13 were undisputedly publicly known, and
 11 Defendants cannot offer evidence to the contrary. Second Plaintiff has offered ample evidence
 12 that Tesla stock was traded in an efficient market. The fundamental element for establishing
 13 classwide reliance in a fraud-on-the market case is market efficiency. *See Erica P. John Fund,*
 14 *Inc. v. Halliburton Co.*, 563 U.S. 804, 813, 131 S. Ct. 2179, 2186 (2011) (observing that *Basic*’s
 15 “fundamental premise” is “that an investor presumptively relies on a misrepresentation so long as
 16 it was reflected in the market price at the time of his transaction”); Ninth Circuit Manual of Model
 17 Civil Jury Instructions, No. 18.7 Securities – Justifiable Reliance – Fraud-on-the-Market Case.
 18 Dr. Hartzmark testified that through his analysis of Tesla stock and stock options, he found that
 19 “the common stock and stock options of Tesla traded in open, well developed, and efficient
 20 markets.” 1/31 Tr. at 1649:1-5. Dr. Hartzmark further found, related to notes, that “at least for the
 21 price movements they were consistent with what you would expect in an efficient market.” *Id.* at
 22 1649:6-8. Defendants have made no effort to challenge Dr. Hartzmark’s finding of market
 23 efficiency.

24 Third, there is no dispute that Plaintiff purchased Tesla options between August 7, 2018,
 25 when Musk tweeted the false statements, and August 16, 2018. More importantly, because this is
 26 a certified class action, there is also no dispute that class members purchased stock between the
 27 time of the false statements and the final disclosure of the truth. By its very definition, only
 28

investors who purchased Tesla stock and/or options during the Class Period can be members of the Class. ECF No. 298. Finally, the false tweets were material as detailed above.

While the presumption of class-wide reliance in a fraud-on-the-market case is rebuttable, to rebut the presumption, Defendants must put forth “evidence that an alleged misrepresentation did not actually affect the market price of the stock.” *Halliburton II*, 134 S. Ct. at 2417; *see also In re Intuitive Surgical Sec. Litig.*, No. 5:13-cv-01920-EJD, 2016 U.S. Dist. LEXIS 178148, at *37-38 (N.D. Cal. Dec. 22, 2016) (“Defendants bear both the burden of production and the burden of persuasion on the issue of price impact.”); *Hatamian v. Advanced Micro Devices, Inc.*, No. 14-cv-00226 YGR, 2016 U.S. Dist. LEXIS 34150, at *20-21 (N.D. Cal. Mar. 16, 2016) (finding that “the burden to show no price impact” rests “on [d]efendants”). Defendants have not even attempted to meet this burden.²

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests judgment pursuant to Rule 50(a) on the issues of materiality and reliance.

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Respectfully submitted,

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-and-

² Plaintiff also seeks judgment on the issue of individual reliance. Both Lead Plaintiff Glen Littleton and Tim Fries testified that they relied on the “funding secured” tweet. *See* 1/18 Tr. at 362:9-13; 1/20 Tr. at 507:20-509:18. This testimony supports granting judgment on the issue of reliance under a direct theory of reliance. *See In re Atossa Genetics Inc. Sec. Litig.*, 868 F.3d 784, 795 (9th Cir. 2017) (“Most directly, Plaintiffs can allege that they were aware of, and specifically relied on, Quay’s false statements when deciding to purchase or sell Atossa shares.”).

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